FILED
JUN 6 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(4)

No. 06-1471

IN THE

Supreme Court of the United States

DENNIS W. GAY, ET AL.,
Petitioners,

v.

SARAH MORGAN, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JOHN H. BEISNER
(*Counsel of Record*)
JESSICA D. MILLER
RICHARD G. ROSE
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Attorneys for Amicus Curiae

No. 06-1471

IN THE

Supreme Court of the United States

DENNIS W. GAY, ET AL.,
Petitioners,

v.

SARAH MORGAN, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

The Chamber of Commerce of the United States of America ("the Chamber") hereby moves this Court, pursuant to Rule 37.2, for leave to file the attached brief amicus curiae in support of petitioners in this case. While the petitioners have consented to the filing of this brief, respondents Sarah Morgan, *et al.*, have not consented. Correspondence reflecting the consent of the petitioners has been lodged with the Clerk.

The Chamber is the world's largest business federation, with an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber is well positioned to assist the Court in its evaluation of the parties' arguments because the Chamber regularly advances the interests of its members in courts throughout the country on issues of critical concern to the

business community, and has participated as amicus curiae in numerous cases addressing jurisdictional issues, including recently in *Kircher v. Putnam Funds Trust*, 547 U.S. ---, 126 S. Ct. 2145 (2006).

The Chamber's members are frequently defendants in individual cases and class actions in which the existence of federal diversity jurisdiction is at issue. In addition, the Chamber was involved – on behalf of its members – in organizing support for the much needed class action reforms reflected in the Class Action Fairness Act of 2005 ("CAFA"). As a result, the organization has a wealth of experience in interpreting the jurisdictional requirements set forth in CAFA and is uniquely suited to provide the Court with significant guidance in addressing the policy goals and intent of the legislation – an issue not addressed in detail in the parties' briefs that might otherwise escape the Court's attention.

The Chamber and its members have a strong interest in seeking review of the Third Circuit's December 15, 2006 opinion, which substantially raised the burden on defendants removing cases to federal court by requiring defendants to establish federal jurisdiction by a "legal certainty" and allowing district courts to consider non-binding, post-removal statements by plaintiffs regarding the value of their claims when determining whether the amount in controversy requirement has been met. The Third Circuit's opinion, if left undisturbed, will significantly restrict the ability of defendants to remove cases to federal court – in direct contravention of their constitutional and statutory rights. The Third Circuit's opinion will also blunt the effectiveness of the recent Class Action Fairness Act, wherein Congress specifically provided for expanded federal jurisdiction over, and relaxed the impediments to removal of, certain interstate class actions. The Third Circuit's decision will have far-reaching effects on companies that do business in the United States, many of which are members of the Chamber, by

denying them the ability to avail themselves of diversity jurisdiction.

For the foregoing reasons, the Chamber's motion to file an *amicus* brief in support of petitioners should be granted.

Respectfully submitted,

JOHN H. BEISNER
(*Counsel of Record*)
JESSICA D. MILLER
RICHARD G. ROSE
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Counsel for Amicus Curiae
The Chamber of Commerce of
The United States of America

June 6, 2007

TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE 1

QUESTIONS PRESENTED.....1

SUMMARY OF THE ARGUMENT.....1

ARGUMENT 2

I. THE THIRD CIRCUIT'S DECISION NULLIFIES THE STATUTORY RIGHT TO REMOVE CASES BASED ON DIVERSITY JURISDICTION.....2

A. The "Legal Certainty" Test Employed By The Circuit Court Improperly Restricts Federal Jurisdiction 5

B. The Third Circuit's Ruling Further Undermines Diversity Jurisdiction By Allowing Plaintiffs To Evade Jurisdiction Through Non-Binding Damages Limitations 10

II. THE THIRD CIRCUIT'S RULING UNDERMINES CONGRESS'S INTENT TO EXPAND FEDERAL JURISDICTION UNDER CAFA 14

CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

Cases

Bank of the United States v. Deveaux,
9 U.S. (5 Cranch) 61 (1809).....3

Barrow S.S. Co. v. Kane,
170 U.S. 100 (1898).....3

Bolling v. Union Nat'l Life Ins. Co.,
900 F. Supp. 400 (M.D. Ala. 1995).....6

Burns v. Windsor Ins. Co.,
31 F.3d 1092 (11th Cir. 1994).....7

Chase v. Shop 'N Save Warehouse Foods,
110 F.3d 424 (7th Cir. 1997).....13

Constant v. Int'l House of Pancakes, Inc., No. 07-AR-0072-S, 2007 U.S. Dist. LEXIS 33354 (N.D. Ala. Apr. 30, 2007).....9, 10

De Aguilar v. Boeing Co.,
47 F.3d 1404 (5th Cir. 1995).....5, 12

Douglas Energy of N.Y., Inc. v. Mobil Oil Corp.,
585 F. Supp. 546 (D. Kan. 1984).....3

Egan v. Premier Scales & Sys.,
237 F. Supp. 2d 774 (W.D. Ky. 2002).....12

Evans v. Walter Indus.,
449 F.3d 1159 (11th Cir. 2006).....14

Gafford v. Gen. Elec. Co.,
997 F.2d 150 (6th Cir. 1993).....6, 7, 8

Garza v. Bettcher Indus., Inc.,
752 F. Supp. 753 (E.D. Mich. 1990).....7

Gilmer v. Walt Disney Co.,
915 F. Supp. 1001 (W.D. Ark. 1996).....12

TABLE OF AUTHORITIES

Page(s)

Hayfield v. Home Depot U.S.A., Inc.,
168 F. Supp. 2d 436 (E.D. Pa. 2001) 6

Hicks v. Herbert,
122 F. Supp. 2d 699 (S.D. W. Va. 2000) 12

Holmes v. Citifinancial Mortgage Co.,
436 F. Supp. 2d 829 (N.D. Miss. 2006) 11

Landmark Corp. v. Apogee Coal Co.,
945 F. Supp. 932 (S.D. W. Va. 1996) 6

Lowery v. Hanna Steel Corp.,
483 F.3d 1184 (11th Cir. 2007) 9

Martin v. Hunter's Lessee,
14 U.S. (1 Wheat.) 304 (1816) 3

N. Haven Bd. of Educ. v. Bell,
456 U.S. 512 (1982) 15

Pease v. Peck,
59 U.S. (18 How.) 595 (1856) 3

Penn v. Wal-Mart Stores, Inc.,
116 F. Supp. 2d 557 (D.N.J. 2000) 6

Rogers v. Frito-Lay, Inc.,
611 F.2d 1074 (5th Cir. 1980) 16

Rogers v. Wal-Mart Stores, Inc.,
230 F.3d 868 (6th Cir. 2000) 13

St. Paul Mercury Indem. Co. v. Red Cab Co.,
303 U.S. 283 (1938) 13

Tapscott v. MS Dealer Serv. Corp.,
77 F.3d 1353 (11th Cir. 1996) 5

Zahn v. Int'l Paper Co.,
414 U.S. 291 (1973) 16

TABLE OF AUTHORITIES

Page(s)

Statutes and Legislative History

28 U.S.C. § 1332 ..... 2, 14, 16

28 U.S.C. § 1441 2

28 U.S.C. § 1446 ..... 11, 16

28 U.S.C. § 1453 16

Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (2005) 2, 14

151 Cong. Rec. H723 (daily ed. Feb. 17, 2005) 15

Class Action Fairness Act of 1999: Hearing on S. 353 Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary, 106th Cong. (1999) 4

Class Action Jurisdiction Act of 1998: Hearing on H.R. 3789 Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary, 105th Cong. (1998) 4

S. Rep. No. 109-14 (2005) 15

Other Authorities

The Federalist No. 80 (Jacob E. Cooke ed. 1961) 3

James William Moor & Donald T. Weckstein, *Diversity Jurisdiction: Past, Present and Future*, 43 Tex. L. Rev. 1 (1964) 4

John J. Parker, *The Federal Constitution and Recent Attacks Upon It*, 18 A.B.A. J. 4337 (1932) 4

Steven Plitt & Joshua D. Rogers, *Charting A Course For Federal Removal Through The Abstention Doctrine: A Titanic Experience In The Sargasso Sea Of Jurisdictional Manipulation*, 56 DePaul L. Rev. 107 (2006) 7

TABLE OF AUTHORITIES

Page(s)

Heather Scribner, *Protecting Federalism Interests after the Class Action Fairness Act of 2005: A Response to Professor Vairo*, 51 Wayne L. Rev. 1417 (2005) 17

H. Hunter Twiford, III, et al., *CAFA's New "Minimal Diversity" Standard For Interstate Class Actions*, 25 Miss. C. L. Rev. 7 (2005).....8, 15, 17

Quentin F. Urquhart, Jr., *Amount in Controversy and Removal: Current Trends and Strategic Considerations*, 62 Def. Couns. J. 509 (1995) 8, 11

Sarah S. Vance, *A Primer On The Class Action Fairness Act Of 2005*, 80 Tul. L. Rev. 1617 (2006).....15, 16

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

The Chamber of Commerce of the United States of America ("the Chamber") respectfully submits this brief *amicus curiae* in support of the petition for a writ of certiorari in this case.[1]

INTEREST OF AMICUS CURIAE

The interest of *amicus curiae* is set forth in the foregoing Motion for Leave to File.

QUESTIONS PRESENTED

This brief addresses the following questions presented in the petition for a writ of certiorari:

1. Does the Third Circuit's opinion improperly limit federal diversity jurisdiction by increasing the standard of proof by which removing defendants must prove the amount in controversy and by allowing district courts to consider non-binding, post-removal damage limitations when determining whether the amount in controversy requirement has been met?

2. Does the Third Circuit's opinion directly and improperly contravene Congress's intent in enacting the Class Action Fairness Act?

SUMMARY OF THE ARGUMENT

Since our nation's founding, diversity jurisdiction has existed to ensure that proceedings involving parties from different states and sufficiently large quantities of money can be fairly adjudicated in a federal court. In furtherance of that goal, Congress recently amended the diversity statute, in the

---

[1] Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part. No person or entity, other than the Chamber and its members, made a monetary contribution to the preparation and submission of this brief.

form of the Class Action Fairness Act of 2005 ("CAFA"),[2] and greatly expanded defendants' access to a federal forum in certain class action and "mass action" cases.

The Third Circuit's ruling in this case undermines both the long-standing constitutional right of defendants to litigate diverse cases in federal court as well as Congress's more recent conclusion that large, interstate class actions should be litigated in a federal forum. Specifically, the Third Circuit's decision in this matter substantially increases the burden on defendants removing cases to federal court by: (1) holding that such defendants must establish to a "legal certainty" that federal diversity jurisdiction exists over a removed case or face remand; and (2) allowing the district court to rely on a non-binding damages limitation in a plaintiff's complaint and/or plaintiff's non-binding, post-removal statement regarding the worth of his or her claims when considering whether those claims exceeded the jurisdictional threshold for diversity jurisdiction.

Taken together, the Third Circuit's rulings would severely restrict defendants' ability to remove cases to federal court, thereby denying defendants their constitutional and statutory right to a federal forum in interstate cases. The ruling should be reviewed and reversed.

ARGUMENT

I. THE THIRD CIRCUIT'S DECISION NULLIFIES THE STATUTORY RIGHT TO REMOVE CASES BASED ON DIVERSITY JURISDICTION.

The Third Circuit's ruling would nullify the diversity jurisdiction and removal statutes enacted by Congress to establish a federal forum for interstate cases. *See generally* 28 U.S.C. §§ 1332, 1441.

---

[2] Pub. L. 109-2, 119 Stat. 4 (2005).

The concept of diversity jurisdiction has its roots in Article III of the Constitution. The Framers were concerned that some state courts might discriminate against out-of-state businesses engaged in interstate commerce. In short, they feared that non-local defendants might be "hometowned" in state courts. *See Douglas Energy of N.Y., Inc. v. Mobil Oil Corp.*, 585 F. Supp. 546, 548 (D. Kan. 1984) (noting that it is a "familiar notion that Congress has created diversity jurisdiction and the right of removal . . . for the purpose of protecting out-of-state litigants from local prejudice"). By allowing cases involving diverse parties to be heard in federal court, the Framers sought to ensure the availability of a fair, uniform, and efficient forum for adjudicating interstate commercial disputes.[3]

The Framers also believed that federal jurisdiction over diverse claims was necessary to ensure cohesiveness among the states and to strengthen national unity. In establishing diversity jurisdiction, the Framers "sought to prevent even

---

[3] *See Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809) (Marshall, C.J.) ("[Even if] tribunals of states will administer justice as impartially as those of the nation, to the parties of every description . . . the Constitution itself . . . entertains apprehensions on this subject . . . [such] that it has established national tribunals for the decision of controversies between . . . citizens of different states."), *overruled in part on other grounds by Louisville, Cincinnati & Charleston R.R. v. Letson*, 43 U.S. (2 How.) 497 (1844); *Barrow S.S. Co. v. Kane*, 170 U.S. 100, 111 (1898) ("The object of the [diversity jurisdiction] provisions . . . conferring upon the [federal courts] ... jurisdiction [over] controversies between citizens of different States of the Union . . . was to secure a tribunal presumed to be more impartial than a court of the State in which one of the litigants resides."); *Pease v. Peck*, 59 U.S. (18 How.) 595, 599 (1856) (same); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 346 (1816). *See also* The Federalist No. 80, at 537-38 (Alexander Hamilton) (Jacob E. Cooke ed. 1961) ("[I]n order to [ensure] the inviolable maintenance of that equality of privileges and immunities to which the citizens of the union will be entitled, the national judiciary ought to preside in all cases in which one state or its citizens are opposed to another state or its citizens.").

the perception of bias" by state courts against out-of-state defendants "because they feared that if litigants believed they had suffered discrimination" in another state's court "they would develop prejudices against other states, thereby destroying the federal comity principles upon which our Union is founded." *Class Action Jurisdiction Act of 1998: Hearing on H.R. 3789 Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 105th Cong. at 80 (1998) (statement of John L. McGoldrick). *See also The Class Action Fairness Act of 1999: Hearing on S. 353 Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 106th Cong. 100 (1999) (prepared statement of Prof. E. Donald Elliott, Yale Law School) (noting that "diversity jurisdiction not only was designed to protect against bias, but to shore up confidence in the judicial system by preventing even the appearance of discrimination in favor of local residents"); James William Moor & Donald T. Weckstein, *Diversity Jurisdiction: Past, Present and Future*, 43 Tex. L. Rev. 1, 16 (1964).

In short, since the nation's inception, diversity jurisdiction has served to guarantee that parties of different state citizenship have a means of resolving their legal differences on a level playing field in a manner that nurtures interstate commerce. In fact, constitutional scholars have argued that:

> *[n]o power exercised under the Constitution . . . had greater influence in welding these United States into a single nation [than diversity jurisdiction]*; nothing has done more to foster interstate commerce and communication and the uninterrupted flow of capital for investment into various parts of the Union, and nothing has been so potent in sustaining the public credit and the sanctity of private contracts.

John J. Parker, *The Federal Constitution and Recent Attacks Upon It*, 18 A.B.A. J. 433, 437 (1932) (emphasis added)

The Third Circuit's decision in this case would torpedo the intent of the Framers in establishing diversity jurisdiction and nullify the efforts of Congress to codify it. Taken together, the Third Circuit's holding that removing defendants must establish the amount in controversy requirement to a "legal certainty" closes the doors of the federal courthouses in the Third Circuit to removing defendants, and its finding that district courts may consider non-binding, post-removal statements by plaintiffs purporting to limit the value of their claims nails those doors shut. The ruling should be reviewed and reversed.

A. The "Legal Certainty" Test Employed By The Circuit Court Improperly Restricts Federal Jurisdiction.

The Third Circuit's ruling that removing defendants must demonstrate that the amount in controversy in plaintiffs' claims satisfies the jurisdictional threshold to a "legal certainty" will severely limit the ability of defendants to remove cases to federal court by holding defendants to a much higher standard than that recognized by the majority of circuit courts and enabling plaintiffs to easily thwart removal efforts by filing evasive complaints.

Courts around the country have long applied a "preponderance of the evidence" standard in cases where jurisdiction is contested, requiring that a removing defendant show that it is more likely than not that the amount in controversy exceeds the jurisdictional minimum. As these courts have recognized, the preponderance of the evidence standard is neither too lenient nor too strict: it ensures that the plaintiff is "to some extent, still the master of his own claim," *De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1411-12 (5th Cir. 1995), while, at the same time, protecting the defendant's statutory right to a federal forum. *See Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1357 (11th Cir. 1996) (noting that the preponderance standard strikes the "proper balance between a plaintiff's right to choose his

forum and a defendant's right to remove"); *Gafford v. Gen. Elec. Co.*, 997 F.2d 150, 160 (6th Cir. 1993) (employing the preponderance test because "[w]e believe that the mean between the extremes unsettles to the least extent the balance struck between the defendant's right to remove and the federal interest in limiting diversity jurisdiction").[4] *See also Landmark Corp. v. Apogee Coal Co.*, 945 F. Supp. 932, 935 (S.D. W. Va. 1996) (endorsing the preponderance of evidence standard and observing that "the closest Supreme Court dictum on point suggests that a defendant need only prove by a preponderance of the evidence that the requisite amount exists") (citing *McNutt v. GMAC of Ind.*, 298 U.S. 178, 189 (1936)); *Bolling v. Union Nat'l Life Ins. Co.*, 900 F. Supp. 400, 404 (M.D. Ala. 1995) (preponderance of the evidence standard "properly balance[s] the plaintiff's right to pursue her action in the forum of her choosing and the defendant's right to a federal forum in those cases where federal jurisdiction exists").

The preponderance standard has been embraced by courts and commentators alike because that standard appropriately balances a plaintiff's interest in selecting the forum for his or her action and the defendant's right to avoid the potential for bias and prejudice in another state's courts.

---

[4] Prior to the Third Circuit's ruling in this case, district courts within the Third Circuit viewed the preponderance of the evidence standard favorably because it "properly balances the congressional intention to limit removal and diversity jurisdiction with the protection of the defendant's statutory right to remove in appropriate circumstances." *Penn v. Wal-Mart Stores, Inc.*, 116 F. Supp. 2d 557, 562 (D.N.J. 2000) (adopting the preponderance of the evidence standard "after considering alternative standards of proof used by other courts"); *Hayfield v. Home Depot U.S.A., Inc.*, 168 F. Supp. 2d 436, 454 n.12 (E.D. Pa. 2001) ("Though the Third Circuit has not ruled specifically on the appropriate evidentiary standard, many courts in our Circuit and nationally have held that a preponderance of the evidence is sufficient to establish the amount in controversy for the purpose of establishing federal diversity jurisdiction.").

Moreover, the standard allows defendants – who have little knowledge of the facts relating to the true value of plaintiffs' claims – a fair chance at establishing federal jurisdiction. Steven Plitt & Joshua D. Rogers, *Charting A Course For Federal Removal Through The Abstention Doctrine: A Titanic Experience In The Sargasso Sea Of Jurisdictional Manipulation*, 56 DePaul L. Rev. 107, 124 n.138 (2006) (quoting Lawrence W. Moore, *Federal Jurisdiction & Procedure*, 41 Loy. L. Rev. 469, 481 (1995) (finding that the "preponderance of evidence" standard "seems a sensible and durable equilibrium point on which to balance the parties' interests")).

By contrast, the "legal certainty" test embraced by the Third Circuit in this case tips this balance strongly – and unfairly – in favor of plaintiffs. Under the "legal certainty" test, the plaintiff's claim for damages "deserves deference and a presumption of truth." *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir. 1994). To meet the "legal certainty" standard, a removing "defendant must prove to a legal certainty that plaintiff's claim must exceed" the jurisdictional minimum. *Id.* This test creates a serious hurdle for removing defendants, who, unlike plaintiffs, may have no actual knowledge of the value of the claims. As a result, the legal certainty test inappropriately requires the defendant to "research, state and prove the plaintiff's claim for damages," *Gafford*, 997 F.2d at 159, without any real means to do so. Indeed, "[i]f the burden of proof were on the defendant in a removed case to show the factual predicate for federal jurisdiction to a legal certainty," as the Third Circuit contends it is, "then the defendant would have to prove the plaintiff's damages to a legal certainty in order to withstand a remand to state court. The application of the legal certainty test in that case would place the defendant in the unenviable position of having to prove the plaintiff's case." *Garza v. Bettcher Indus., Inc.*, 752 F. Supp. 753, 756 (E.D. Mich. 1990).

This approach to jurisdiction is undesirable for numerous reasons, not the least of which is that it may lead defendants to forgo their statutory right to a federal forum rather than "being forced to prove the other side's damages case." *Gafford*, 997 F.2d at 160 (citing *Garza*, 752 F. Supp. at 756-57). Moreover, because defendants' knowledge regarding the value of plaintiffs' claims is largely limited to the facts plaintiffs alleged in their complaint and supporting documents, requiring defendants to prove that the jurisdictional amount has been met to a degree of "legal certainty" essentially allows plaintiffs to foreclose federal jurisdiction completely by limiting (or misrepresenting) the facts related to the value of their claims in their pleadings.

Since most plaintiffs seek to structure complaints so as to avoid federal court (*e.g.*, by avoiding any real description of their damages or understating their *ad damnum* intentions), a court's decision to use the "legal certainty" test versus the "preponderance" test will, in most cases, be outcome-determinative. If a court embraces the "preponderance" test, the defendant has a fighting chance of showing that the plaintiff's alleged damages will *likely* exceed the jurisdictional amount. By contrast, under the "legal certainty" test, it is almost impossible for the defendant to prove, at the pleading stage, the true value of the plaintiff's claims. *See* Quentin F. Urquhart, Jr., *Amount in Controversy and Removal: Current Trends and Strategic Considerations*, 62 Def. Couns. J. 509, 514 (1995) ("maintenance of a federal forum will likely turn on the burden imposed on the removing party"); *see also* H. Hunter Twiford, III, et al., *CAFA's New "Minimal Diversity" Standard For Interstate Class Actions*, 25 Miss. C. L. Rev. 7, 8 (2005) ("many jurisdictional contests involve close facts or close legal issues, and the outcome in these instances is often decided against the party who bears the burden of proof").

This concern is neither theoretical nor exaggerated. Recent decisions in the Eleventh Circuit provide powerful

evidence that raising the standard for removal in the manner done by the Third Circuit here essentially forecloses diversity jurisdiction unless the plaintiff concedes that the amount in controversy is satisfied.

In *Lowery v. Hanna Steel Corp.*, 483 F.3d 1184 (11th Cir. 2007), the Eleventh Circuit departed from the long-standing rule in that Circuit that removal notices are judged under the "preponderance of the evidence" standard by establishing a new rule barring removals unless "the jurisdictional amount is either stated clearly on the face of the documents before the court, or readily deducible from them," a standard akin to legal certainty. *Id.* at 1211.[5] Immediately on the heels of the *Lowery* decision, a district court in that Circuit interpreted the new "clear statement" standard as an effective bar to diversity jurisdiction where the plaintiff has not specifically alleged damages over the jurisdictional amount. *See Constant v. Int'l House of Pancakes, Inc.*, No. 07-AR-0072-S, 2007 U.S. Dist. LEXIS 33354 (N.D. Ala. Apr. 30, 2007)

Constant involved a plaintiff who sought personal injury damages resulting from a slip-and-fall accident at the defendant's restaurant. *Id.* at *2. Despite the fact that plaintiff offered to settle the case for $75,000 in a pre-suit demand letter, submitted by the defendant with its removal notice, the court, applying *Lowery*, remanded the case to state court, concluding it was "left with speculation as the only means by which it could conclude that the amount in controversy exceeds $75,000 in value." *Id.* at *14. The court further concluded that, in light of the *Lowery* decision, defendants simply should not remove cases to district courts

---

[5] Defendants in *Lowery* have since filed a petition for rehearing *en banc* seeking review of the panel's decision. *See Lowery v. Hanna Steel Corp.*, Nos. 06-16324-CC & 06-16325-CC (11th Cir. May 2, 2007). The Chamber has moved to file a brief as *amicus curiae* in support of the petition for rehearing in that case.

in the Eleventh Circuit on the basis of diversity jurisdiction, "except in the few cases which begin with a state court complaint with an *ad damnum* clause praying for more than $75,000." *Id.* at *1.

Absent review of the instant case, defendants in the Third Circuit will be similarly barred from federal court. By requiring defendants to satisfy a "legal certainty" test, the Third Circuit's ruling will effectively preclude removal in every case in which the plaintiff does not specifically allege claims exceeding the jurisdictional amount. Moreover, the Third Circuit's opinion would encourage plaintiffs to limit the information set forth about the value of their claims in their complaints in order to evade federal jurisdiction. Such a result is directly contrary to the purpose of diversity jurisdiction – *i.e.*, to provide a federal forum for defendants where they might experience local bias in state court.

B. The Third Circuit's Ruling Further Undermines Diversity Jurisdiction By Allowing Plaintiffs To Evade Jurisdiction Through Non-Binding Damages Limitations.

The Third Circuit's overly restrictive "legal certainty" standard is exacerbated by its willingness to: (1) accept non-binding limitations on damages set forth in a plaintiff's pleadings as evidence of the value of that plaintiff's claims; and (2) rely on non-binding, post-removal statements by plaintiffs about the amount in controversy in support of a motion for remand. By allowing plaintiffs to present this unreliable and self-serving evidence in support of their attempts to remand cases to state court, while at the same time requiring defendants to prove the amount in controversy to a "legal certainty," the Third Circuit has essentially stated that removals based on diversity jurisdiction are no longer permitted in the Third Circuit absent plaintiff consent.

1. In concluding that the amount in controversy was not satisfied in this case, the Third Circuit impermissibly relied

on the plaintiff's statement in her complaint that she sought an amount of damages less than the jurisdictional amount, even though that statement was not binding. (*See* Op. at 13 ("if permitted by state laws, [plaintiff] may limit her monetary claims to avoid the amount in controversy threshold").) Under this approach, a plaintiff can *purport* to seek $74,999 in a state court complaint and then re-state the true, higher, value of her claims once removal is no longer timely. Since most states have adopted rules, similar to Fed. R. Civ. P. 54(c), that *do not* limit a plaintiff's damage award to the amount specified in the original complaint, such statements are essentially meaningless. Urquhart, *supra*, at 517.

The risk of forum manipulation posed by non-binding damages limitations is all the greater in non-class action cases, where there is a one-year limit on removal. *See* 28 U.S.C. § 1446(b). In those cases, a plaintiff can simply claim minimal damages in his or her complaint in order to avoid removal and then amend his or her complaint a year and one day after it was filed to add a valuable claim for punitive damages. As the court noted in *Holmes v. Citifinancial Mortgage Co.*, 436 F. Supp. 2d 829, 832 (N.D. Miss. 2006), without a binding stipulation that a plaintiff will not accept more than $75,000 in damages, there is nothing to prevent plaintiffs (with cases worth well over $75,000) from routinely avoiding federal court by explicitly claiming to seek less than $75,000 in the complaint and then amending the complaint once it is too late for the defendants to remove to federal court.

It is this type of gamesmanship that has motivated many courts to use common sense and "read between the lines" of the relief sought in a state court complaint instead of simply taking the statement of damages set in the plaintiff's pleading as fact. These courts have recognized that the only way "to guard against forum shopping and encroachments on the defendant's right of removal" is to require that plaintiffs

seeking to avoid federal jurisdiction file "an unequivocal statement and stipulation limiting damages" with their complaint. *Egan v. Premier Scales & Sys.*, 237 F. Supp. 2d 774, 778 (W.D. Ky. 2002). *See also De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1412 (5th Cir. 1995) (plaintiffs "who want to prevent removal must file a binding stipulation or affidavit with their complaints") (citing *In re Shell Oil Co.*, 970 F.2d 355, 356 (7th Cir. 1992)); *Hicks v. Herbert*, 122 F. Supp. 2d 699, 701 (S.D. W. Va. 2000) ("because under West Virginia law Plaintiffs' recovery is theoretically unlimited, only a binding stipulation that they would not seek nor accept more than $75,000 could limit the potential recovery"); *Gilmer v. Walt Disney Co.*, 915 F. Supp. 1001, 1011 (W.D. Ark. 1996) ("It appears that plaintiff has attempted to 'have her cake and eat it too.' She argues in this court that she is only entitled to crumbs, but has carefully preserved her right to insist that she is entitled to the whole cake when she gets back to state court.").

Rather than apply this healthy dose of skepticism to plaintiff's non-binding damages limitation, the Third Circuit here took the plaintiff at face value, allowing remand based on nothing more than a "gentleman's promise." Such an approach will make it all the more difficult – if not impossible – for defendants in the Third Circuit to exercise their removal rights in diversity jurisdiction cases.

2. The Third Circuit's opinion also restricts a defendant's removal rights by affirming remand based on a *post-removal* stipulation by plaintiff purporting to limit her demand for relief. While the Third Circuit admitted that the plaintiff did not seek to limit her damages until *after* the filing of a reply brief in support of remand (*see* Op. at 15 ("the plaintiff did not explicitly limit the disgorgement of profits demand to New Jersey sales rather than nationwide sales until her remand reply brief")), the Third Circuit nonetheless placed weight on plaintiff's eleventh-hour

limitation in concluding that the amount in controversy was not satisfied.

Because reliance on post-removal stipulations raises very serious forum manipulation concerns, it has long been the rule that jurisdiction is judged by the facts available at the time of removal. *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 291 (1938) ("the status of the case as disclosed by the plaintiff's complaint is controlling in the case of a removal"). The Third Circuit implicitly rejected this long-standing approach by considering post-removal evidence regarding the value of the plaintiff's claims. As other courts have recognized in rejecting the approach taken here, "[i]f plaintiffs were able to defeat jurisdiction by way of a post-removal stipulation, they could unfairly manipulate proceedings merely because their federal case begins to look unfavorable. Moreover, the interests of simplicity and uniformity dictate that post-removal stipulations be treated just like any other post-removal event." *Rogers v. Wal-Mart Stores, Inc.*, 230 F.3d 868, 872 (6th Cir. 2000). *See also Chase v. Shop 'N Save Warehouse Foods*, 110 F.3d 424, 430 (7th Cir. 1997) ("allowing a plaintiff to follow the 'wait and see' approach to choosing her forum is unfair to defendants"). The Third Circuit ignored these concerns, endorsing an approach that allows plaintiffs to dip their toes in federal court waters and then run back to the shores of state court if they are disappointed with what they find. This is precisely the result *St. Paul* was intended to guard against.

In sum, the Third Circuit's rulings in this case, taken together, effectively cut off all avenues to a federal forum for a removing defendant in contravention of 28 U.S.C. §§ 1332 and 1441 and this Court's prior holdings – and in conflict with the approach taken by courts around the country. For these reasons, it should be reviewed by the Court.

II. THE THIRD CIRCUIT'S RULING UNDERMINES CONGRESS'S INTENT TO EXPAND FEDERAL JURISDICTION UNDER CAFA.

The Third Circuit's decision also merits review because it is at odds with Congress's intent to substantially expand diversity jurisdiction over class actions by enacting the Class Action Fairness Act.

CAFA was enacted in 2005 to extend federal jurisdiction to certain class actions. Specifically, CAFA provides for expanded jurisdiction in class actions where (1) there are 100 or more members in the plaintiff's proposed class; (2) at least some members of the proposed class have a different citizenship from some defendants; and (3) the claims of the proposed class members exceed the sum or value of $5,000,000 in the aggregate. *See* 28 U.S.C. § 1332(d).

Congress's purpose in enacting CAFA cannot be seriously disputed. CAFA's text, specifically its legislative findings and stated purposes, clearly demonstrates that Congress sought to develop a new jurisdictional regime that would "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance." Class Action Fairness Act of 2005, Pub. L. No. 109-2, §§ 2(a)(4)(A), 2(b)(2), 119 Stat. 4 (2005).

As courts have previously recognized, "CAFA's language favors federal jurisdiction over class actions" and the "language and structure of CAFA itself indicates that Congress contemplated broad federal court jurisdiction." *See Evans v. Walter Indus.*, 449 F.3d 1159, 1163-64 (11th Cir. 2006). Consistent with the overall intent of the legislation, Congress made clear that doubts regarding removal should be resolved in favor of federal jurisdiction. According to the Senate Report, "[t]he Committee believes that the federal courts are the appropriate forum to decide most interstate class actions because these cases usually

involve large amounts of money and many plaintiffs, and have significant implications for interstate commerce and national policy." S. Rep. No. 109-14, at 27 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 27. Commentators have also recognized that "CAFA represents the largest expansion of federal jurisdiction in recent memory." Sarah S. Vance, *A Primer On The Class Action Fairness Act Of 2005*, 80 Tul. L. Rev. 1617, 1643 (2006). Through CAFA, Congress "expressly reflect[ed] a goal of changing the jurisdictional status quo for class actions" by extending "federal jurisdiction over interstate class actions which, prior to CAFA's enactment, could not be maintained in or removed to federal court under the existing" regime. Twiford, *supra*, at 9.

The clear intent of CAFA's sponsors was to lower the burden for removal – not raise it. In a colloquy that took place on the House floor moments before passage, one of the bill's key sponsors, then-House Judiciary Committee chairman F. James Sensenbrenner stated: "if a Federal court is uncertain about whether a case puts $5 million or more in controversy, the court should favor exercising jurisdiction over the case." 151 Cong. Rec. H723, 730 (daily ed. Feb. 17, 2005). *See also* S. Rep. No. 109-14, at 35, *as reprinted in* 2005 U.S.C.C.A.N. at 34 (the intent of CAFA "is to strongly favor the exercise of federal diversity jurisdiction over class actions with interstate ramifications."). While it is well-established that statutory construction requires inquiry into Congressional intent as evidenced in legislative history, this colloquy among key House sponsors of the legislation is entitled to particular deference because it reflects the intentions of the bill drafters and because of its proximity to the House vote. *See N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982) ("Although the statements of one legislator made during debate may not be controlling . . . Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction.") (internal citation omitted);

Rogers v. Frito-Lay, Inc., 611 F.2d 1074, 1080 (5th Cir. 1980) ("In trying to learn Congressional intent by examining the legislative history of a statute, we look to the purpose the original enactment served . . . and the remarks in debate preceding passage.").

In addition to CAFA's legislative history, the text and structure of the statute both clearly demonstrate that the purpose of CAFA was to create a new set of jurisdictional rules for class actions that would provide for federal jurisdiction over large-scale interstate class actions and ensure that defendants facing such large-scale interstate suits could remove them to federal court. *See* Vance, *supra*, at 1630 ("CAFA's broadened diversity jurisdiction over class actions commensurately expands defendants' opportunities to remove class actions."); *id.* at 1639-40 ("CAFA was no doubt intended to liberalize removal for cases within its scope by eliminating some of the statutory limitations on removal").

For example, the statute's text eliminates several long-standing hurdles to removing interstate class actions to federal court – such as the previous requirement that each class member separately meet the $75,000 amount in controversy requirement. *See Zahn v. Int'l Paper Co.*, 414 U.S. 291 (1973). Under CAFA, the claims of putative class members are aggregated to determine if the new $5,000,000 amount is satisfied. 28 U.S.C. § 1332(d)(6). CAFA's requirement that there be minimal diversity among any member of the putative class and any defendant – a departure from the previous rule that required complete diversity among only the class representative(s) and all defendants – also eases an important restriction on removing class actions to federal court.

CAFA also established a new removal provision – 28 U.S.C. § 1453 – applicable only to the removal of diversity class actions. Pursuant to section 1453, class actions may be removed without the consent of any co-defendant, may be

removed without regard to the one-year time limit in 28 U.S.C. § 1446(b), and may be removed without regard to whether any defendant is a citizen of the State in which the suit was originally filed.[6] Taken together, these new provisions "substantially expand federal jurisdiction over class actions" and "drastically liberalize[] rules for removal of class actions." Twiford, *supra*, at 7-8; *see also id.* at 60 ("These fundamental changes greatly liberalize and invite, rather than discourage, federal court jurisdiction over class actions within the scope of CAFA.").

Despite this overwhelming evidence that CAFA was intended to liberalize removal requirements for class actions, reduce the hurdles defendants face in removing cases to federal court, and prevent manipulative pleadings intended to evade jurisdiction, the Third Circuit's decision would make it more difficult for defendants to remove such cases to federal court. In this way, the Third Circuit's ruling turns CAFA on its head – substantially raising the standard for removing cases to federal court instead of relaxing it. Thus, the Third Circuit's ruling "defeat[s] Congress's clear intent in crafting this special-purpose statute," Twiford, *supra,* at 10, and should be reviewed for this reason as well.

---

[6] This provision is not out of step with CAFA's intended goal of protecting out-of-state defendants from local bias. As one commentator has observed, there is "a second purpose for diversity jurisdiction: the Framers feared that state court judges, who lacked life tenure, would be more likely to be influenced by populist sentiments and be biased against merchants." Heather Scribner, *Protecting Federalism Interests after the Class Action Fairness Act of 2005: A Response to Professor Vairo*, 51 Wayne L. Rev. 1417, 1436 (2005) (quotations omitted)

CONCLUSION

For the foregoing reasons, and for the reasons stated by petitioner, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JOHN H. BEISNER
(*Counsel of Record*)
JESSICA D. MILLER
RICHARD G. ROSE
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Attorneys for Amicus Curiae

June 6, 2007